In the High Court of Judicature at Madras

Dated: 20.07.2006

Coram

The Honourable Mr.JUSTICE R.BALASUBRAMANIAN
and
The Honourable Mr.JUSTICE M.JEYAPAUL

Criminal Appeal No.1308 of 2003
& C.M.P.No.1601 of 2006

1. Palanisamy & Chinnasamy @ Vakkil
2. Sasikumar @ Sasi
3. Kannan
4. Nagappan

.... Appellants

Vs.

State rep. by
Inspector of Police,
Veeranam Police Station,
Salem District.

.... Respondent

APPEAL under Section 374 of the Code of Criminal Procedure against the judgment dated 2.1.2003 made in S.C.No.275 of 2002 on the file of Additional District Sessions Judge (Fast Track Court-II), Salem.

For Appellants : Mr.R.Sankarasubbu
For Respondent: Mr.N.R.Elango, Addl. Public Prosecutor

J U D G M E N T

(Judgment of the Court was made by R.BALASUBRAMANIAN,J)

Appellants four in number were tried in S.C.No.275 of 2002 on the file of the Additional Court of Sessions, Salem for the following offences:

Section 294 (b) I.P.C. - A1 and A2
Section 302 read with 34 I.P.C.- A1 to A4
Section 324 I.P.C. - A3 and A4

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At the end of the trial, the learned trial Judge found all the accused guilty of the offences referred to earlier and sentenced A1 and A2 to undergo one year rigorous imprisonment for the offence under section 294 (b) I.P.C.; imprisonment for life against all the accused for the offence under Section 302 read with 34 I.P.C. and one year rigorous imprisonment to accused 3 and 4 for the offence under Section 324 I.P.C. The sentences were directed to run concurrently. Hence the present appeal. Heard Mr.R.Sankarasubbu, learned counsel appearing for the appellants and Mr.N.R.Elango, learned Additional Public Prosecutor appearing for the State.

2. The prosecution case is that accused 1 and 2 at about 7.30 p.m. on 10.2.2002 abused Muthulakshmi, aged 13 in a filthy language and in the course of the same transaction, A1 poured kerosene on Muthulakshmi; A2 threw a lighted match stick on her and A3 and A4 prevented P.W.1 from rescuing Muthulakshmi, leading to the death of Muthulakshmi at 11.20 p.m. on 18.2.2002 and therefore punishable for the offence under Section 302 read with 34 I.P.C. It is the further case of the prosecution that in the course of the same transaction, A3 and A4 had also assaulted P.W.1 with sticks causing injury on his person and therefore they are punishable for the offence under Section 324 I.P.C. In substantiation of their case, the prosecution examined P.Ws.1 to 13 and marked Exs.P.1 to P.24 and M.Os.1 to 4. The defence examined a police constable on their side as D.W.1 and marked Ex.D.1, the statement of Muthulakshmi - since deceased, which she is stated to have given while alive.

3. P.W.1 is the grand father of Muthulakshmi - since deceased and he knows the accused. P.W.2 is the son of P.W.1 and father of the deceased. About eight months prior to P.W.1 giving evidence in court (the evidence was recorded on 11.12.2002) A1 and A2 had made fun of Muthulakshmi while she was grazing cattle in the lands, which she accordingly informed to P.W.1. This made P.W.1 to question A1 and A2 as to why they had done like that and A1 and A2 responded as to who P.W.1 is to question it. Ten days thereafter, A3 and A4 under intoxication came P.W.1's house at about 6.00 p.m. and created a scene. At that time, A1 and A2 brought kerosene; A1 poured kerosene on P.W.1's grand daughter, namely, the deceased. Both A1 and A2 threw a lighted match stick on Muthulakshmi. P.W.1 and his elder brother tried to save Muthulakshmi and at that time, A3 attacked on the head of P.W.1 with a stick and A4 also with a stick attacked on his head. M.O.1 is the kerosene container and M.Os.2 and 3 are the sticks in the hands of A3 and A4. M.O.4 is the match box. Muthulakshmi suffered burn injuries all over her body and she was 19 years on that day. P.W.2 took P.W.1 and Muthulakshmi to the Government Hospital, Salem, where the police examined him and recorded his statement, in which, he had put his left thumb impression. Ex.P.1 is the said complaint. P.W.2 is the father of Muthulakshmi and son of P.W.1. As far as the occurrence proper is concerned, his evidence is that he ran towards the house after seeing his

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daughter in flames and at that time, he saw A1 and A2 dropping the kerosene container and running. When he asked his daughter as to what had happened, his daughter informed him that A1 poured kerosene on her and A2 set fire to her. P.W.1 also informed him that he was assaulted by A3 and A4. He took his father/P.W.1 and his daughter/deceased to the hospital, where he was examined by the police.

4. P.W.12 is the Head constable in the investigating police station. While he was on duty on 11.2.2002, he received information over wireless from the Government Hospital at Salem intimating that P.W.1 and Muthulakshmi - since deceased have been admitted in the hospital. Immediately, he went to the hospital, where he found Muthulakshmi not in a position to talk. He observed P.W.1 and then examined him. P.W.1 gave a statement, which he reduced into writing; read it over to him and then he took his left thumb impression in it. He registered that complaint as Ex.P.1 in his police station Crime No.148 of 2002 for offences under Sections 294(b), 324, 341 and 307 I.P.C. Ex.P.2 is the printed first information report prepared by him and he sent the express records to the Court as well as to the higher officials. He received Ex.P.21, the death intimation from the hospital that Muthulakshmi died at 11.20 p.m. on 18.2.2002, which he handed over to the investigating officer. P.W.13 is the investigating officer, who on receipt of the express records in this case, initially registered the case under Section 307 I.P.C., proceeded to the scene of occurrence where in the presence of P.W.5 and another, he prepared the observation mahazar Ex.P.2 and the rough sketch Ex.P.22. At 4.00 p.m. on the same day in the presence of P.W.5 and another, he recovered the plastic kerosene container; the match box and the sticks used by A3 and A4 under a mahazar attested by witnesses. Then he examined P.W.1 and others by recording their statements. At 11.30 a.m. on 12.2.2002, he arrested all the accused, brought them to the police station at 1.00 p.m. and then he sent them for judicial remand. On receipt of the death intimation from the Government Hospital on 19.2.2002, he altered the section of offence from one under Section 307 I.P.C. to one under Section 302 I.P.C. and prepared the altered printed first information report Ex.P.23, which he sent to the Court as well as to the higher officials.

5. P.W.11 is the duty medical officer in the Government Hospital at Salem. On 11.2.2002, P.W.1 was brought before him by his son P.W.2 for injuries stated to have been sustained by him at 7.30 p.m. at the hands of five males. On examination, he found injuries on his person and issued Ex.P.16, the wound certificate. Ex.P.17 is the intimation sent by him to the police. The symptoms noted by him are a contusion over the right scalp parietal region and a bleeding right nose. Before P.W.11, Muthulakshmi - since deceased was brought on 10.2.2002 for injuries stated to have been sustained by her at 7.30 p.m. on that night, at the hands of four known persons, by pouring kerosene and then setting fire. Ex.P.18 is the admission card and she had suffered 40% burn injuries. Ex.P.19 is the accident register issued by him for her. P.W.10 is the police constable, who identified the dead body of Muthulakshmi in the hospital for post-

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mortem. After post-mortem, he handed over the dead body to the relatives. P.W.8 is the duty medical officer in the Government Hospital at Salem, who on receipt of Ex.P.13 the requistion for post-mortem, conducted post-mortem on the dead body of Muthulakshmi. During post-mortem, he found various symptoms on her, as noted by him in Ex.P.14, the post-mortem report. The symptoms noted by him are as here under:

> Injuries:
>
> Superficial infected burns wounds present over the face, and front and back of the neck, front of the chest, both shoulders, both elbow, and both lower arms and back of the trunk except abdomens and lower limb.
>
> Deep burns wounds are present over the face, neck front of the chest, and both shoulders.
>
> The burns area reddish in colour, singing of eye brows and eye lashes. Head shaved.
> Other findings:
>
> Finger and toe nails intact, cyanosed. Peritonial cavity: empty. Pleural cavity: Empty, Heard: Chambers and valves normal cavity contained fluid blood, coronary vessels and great vessels normal. Lungs: C/s congested; Hyoid bone: Intact Stomach contained 30 gms of chyme present, no specific smell Mucosa congested.
>
> Liver, Spleen, Kidneys: On C.s congested.
> Small intestine: Yellowish chyme present, no smell Mucosa congested.
>
> Bladder: empty; Uterus: empty; normal in size.
> Pelvis, Head, Membrane: Intact, Brain:C/s congested.
> Spinal coloumn: intact."

Doctor opined that death would have occurred as a result of shock due to effect of burns.

6. P.W.6 is the Judicial Magistrate No.2 at Salem. At 2.00 p.m. on 12.2.2002 when he was in his office, he received Ex.P.4, the requisition from the hospital to record the dying declaration of Muthulakshmi. Accordingly, he reached the hospital at 2.30 p.m. and by examining Muthulakshmi, got satisfied that she was in a fit and conscious state of mind. He secured the presence of P.W.9, the duty doctor to be by his side when he was testing the fit and conscious state of mind of Muthulakshmi. Before recording the dying declaration P.W.6 made an endorsement Ex.P.5 stating that the patient is conscious and fit to give dying declaration. Then he proceeded to record the statement by examining her. She stated as here under:- the translation in English is by us:

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"My father is working as a coolie in Leigh Bazaar, Salem. At 7.00 p.m. on 10.2.2002, I was in my house; my father and grand father were talking aloud near the house; A1 and A2 entered my house and they found fault with me as to why I informed my house that A2 abusing me one week earlier; I was watching television; A1 had a Kerosene container and poured kerosene on me; A2 threw a lighted match stick and then they ran away; the elders came and doused the fire."

Ex.P.6 is the said dying declaration. At the foot of the dying declaration P.W.9 had given a certificate Ex.P.15 stating that the patient is fully conscious and in a fit state of mind during recording the dying declaration. Further down, P.W.6 had given his certificate stating that after recording the dying declaration, he read it over to her, she admitted the same as true and correct and that he was satisfied that the patient is fully conscious and in fit state of mind during recording the dying declaration. P.W.9, the duty doctor present by the bed side of Muthulakshmi, when P.W.6 was recording the dying declaration, had also stated that he had given the certificate Ex.P.15 at the foot of the dying declaration. P.W.7 is the Judicial Magistrate No.1, Salem. On receipt of Ex.P.8, the order from the Chief Judicial Magistrate, she proceeded to examine Palani, Arumugam, Ammasi and Kalliappan under Section 164 of the Code of Criminal Procedure. Ex.P.8 order is passed on the basis of Ex.P.7 the application filed by the investigation officer. The witnesses were examined by her on 27.3.2002 and those statements are Exs.P.9 to P.12.

7. P.W.3 is a resident of the same place where P.Ws.1,2 and the deceased were living. He would state that P.W.1 told him that his grand daughter (since deceased) complained to him of the incident that took place prior to the occurrence in question, during which she was abused; P.W.1 questioned accused 1 and 2 as to why they had done like that, for which, accused 1 and 2 responded stating that they would behave only like that. However, he would admit that he had not seen that earlier occurrence and he only heard about it. As far as the occurrence proper is concerned, he would state that when he was in the tea shop at 7.30 p.m., persons present there told him that there was a commotion in his brother's house and accordingly he went there, where he found Muthulakshmi standing outside her house. He also saw the first accused pouring kerosene on Muthulakshmi from the container which he was having and A2 throwing a lighted match stick on her. All of them went to the rescue of Muthulakshmi and at that time, P.W.1 was also assaulted. P.W.1 and Muthulakshmi were taken to the hospital. P.W.4 is the mother of the deceased. She would state that around 7.30 p.m. on the occurrence day, her daughter was set fire to and her father-in-law was also assaulted. She also noticed that her daughter crying in pain. She also noticed the first accused throwing down the kerosene container and then running, while A2 throwing down the match box and running. She tried to rescue her daughter along with others. P.W.5 witnessed the preparation of Ex.P.2 the observation mahazar and recovery of the incriminating objects under Ex.P.3

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as referred to earlier. P.W.13 conducted inquest over the dead body and prepared Ex.P.24 the inquest report. After completing all the legal formalities, P.W.13 filed the final report against the accused before the Court on 30.4.2002 for offences under Sections 302 read with 34, 294 (b) and 307 I.P.C.

8. When the accused were questioned under Section 313 of the Code of Criminal Procedure based on the incriminating materials made available against them, they denied each and every circumstance put up against them as false and contrary to facts. They examined one witness on their side as D.W.1. But we find from the records that after the cross examination of P.W.13, the investigating officer in this case, was completed at the first instance, the defence examined the very same officer on 20.12.2002 by further cross examining him. In such further cross examination of P.W.13 conducted on 20.12.2002, (characterised by the learned trial Judge as D.W.1) had deposed as here under:

> "On 11.2.2002 I recorded the statement of Muthulakshmi; that was in the evening; Ex.D.1 is the said statement;
> Question: Has she told you that she was in a conscious state of mind?
> Answer: Since I found her in a conscious state of mind, I proceeded to record the statement as narrated by her;
> I did not record in the statement that she was in a fit and conscious state of mind; I deny that she was not in a fit and conscious state of mind while giving statement. But however, she was in a fit and conscious state of mind; Muthulakshmi told the doctor that in perpetrating the crime on her, four males and two females took part.
> Question: Have you investigated the case from that angle?
> Answer: yes;
> In the investigation, it came to light only four accused, who are before the Court, alone have committed the crime and no witness spoke about the involvement of any women in the crime; Muthulakshmi - since deceased also do not say anything about that in her statement and that is why I filed the final report only against the accused; it is true that P.W.1 had told the doctor that he had suffered injuries at the hands of five known persons. However, during investigation, P.W.1 told me that A3 and A4 alone attacked him and I accordingly proceeded further with the investigation. I deny that Muthulakshmi-since deceased gave a statement during investigation as narrated by me. Ex.D.1 is the statement so recorded by P.W.13."

9. Mr.R.Sankarasubbu, learned counsel appearing for the appellants would submit that the evidence of P.W.s 1 and 3 do not establish the involvement of any of the accused in the crime and therefore rejecting their evidence, this Court can acquit all the accused. Assuming that the entire prosecution case, as spoken to by the witnesses, is true, yet in

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the light of Ex.P.6, the Judicial dying declaration, the conviction under Section 302 read with 34 I.P.C. against all the four accused cannot be legally sustained, since the judicial dying declaration implicates only A1 and A2. Without prejudice to the above, learned counsel would also submit that recording of the dying declaration is not free from doubt and therefore rejecting the judicial dying declaration, this Court can acquit all the accused from the crime. It is next submitted that in the evidence of P.W.2 (cross examination), it appears that there was a quarrel for quite some time preceding the crime perpetrated on Muthulakshmi - since deceased and therefore, Exception 4 to Section 300 of the Indian Penal Code stands squarely attracted to the case on hand. On top of this and as the last argument, learned counsel would submit that even if this Court accepts that the prosecution case stands fully established, then from the available materials it can be seen that both A1 and A2 are adolescent offenders attracting the provisions of the Tamilnadu Borstal Schools Act. If that is so, even though this court could confirm the conviction on the evidence available, yet this Court has to necessarily set aside the sentence of imprisonment imposed on A1 and A2. Under the provisions of The Tamilnadu Borstal Schools Act, at the maximum, A1 and A2 could be detained only up to their age of 23 and since each of them had already crossed the upper age limit of 23, this Court can straight away quash the sentence and set them at liberty. It is then submitted by the learned counsel for the appellants that since appellants 1 and 2 had already crossed the age of 23, assuming the Government alone has the power to deal with a case where life imprisonment is the sentence imposed, yet the Government could not exercise the power in view of appellants 1 and 2 having crossed the upper age limit prescribed under the above referred to Act. Therefore, his submission is that, assuming for a minute without conceding that this Court has no power to send appellants 1 and 2 to a Borstal School, in view of Section 8 of the said Act, yet in view of the Government not being in a position to exercise their power under Section 10-A of the Act, as stated above, this Court can still extend the provisions of the benevolent provision of Section 10-A of the Act in favour of A1 and A2 and quash the sentence. Learned counsel pressed into service Criminal M.P.No.1601 of 2006, already filed by appellants 1 and 2 to determine their age. In sustaining his point based on the provisions of the Tamilnadu Borstal Schools Act 1925, learned counsel relied upon a number of judgments about which we will refer a little later in this judgment. Mr.N.R.Elango, learned Additional Public Prosecutor would contend that on the merits of this case there cannot be any escape from the only conclusion that in any event A1 and A2 are guilty of the offence of murder, though there may be some vagueness in the prosecution case against A3 and A4 are concerned. As far as the application of the Tamilnadu Borstal Schools Act 1925 is concerned, learned Additional Public Prosecutor would submit that going by the provisions of the Act, this Court would have power to deal with the case of an adolescent offender under the provisions of the Tamilnadu Borstal Schools Act only in cases where there is no imprisonment for life. According to him, whenever a Court sentenced a person to imprisonment for life, then application of

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Section 8 of the Tamilnadu Borstal Schools Act stands excluded. According to him, even in such cases, where imprisonment for life is imposed on an adolescent offender, then under Section 10-A of the Tamilnadu Borstal Schools Act, the Government alone has the power to deal with such an adolescent offender. According to him, in all cases where imprisonment for life is given, it is only the Government and the Government alone exercising power under Section 10-A of the Tamilnadu Borstal Act, take a decision as to whether the convict prisoner can be dealt with under the provisions of the Tamilnadu Borstal Schools Act or not and it does not lie within the purview of this Court. In support of his argument, learned Additional Public Prosecutor also relied upon a number of judgments, which we will discuss later in this judgment.

10. In the light of the arguments advanced by the counsel on either side, we went through the entire materials on record giving our due attention. As far as the merits of the case is concerned, besides the oral evidence of P.Ws. 1 and 3, we have the judicial dying declaration given by Muthulakshmi, while alive to P.W.6, the Judicial Magistrate. Ex.P.6 is the judicial dying declaration. Let us now find out, to start with, whether there is any direct evidence regarding the crime and if it is so, is it acceptable? P.W.1 is the grand father of the deceased. He had also suffered an injury on his person and according to him, it is in the course of the same transaction. Ex.P.16 is the wound certificate issued to him by P.W.11. P.W.1's evidence is that as he saw his grand daughter in flames due to the act perpetrated by A1 and A2, he ran to rescue her and at that time, A3 and A4, each armed with a stick assaulted on his head, resulting in injuries to him. P.W.11 is the duty medical officer in the Government Hospital at Salem, who had examined P.W.1 on 11.2.2002 for the injuries stated to have been sustained by him at 7.30 p.m. on the previous night. Ex.P.16 is the accident register, which shows that P.W.1 had suffered a contusion over the right scalp parietal region and a bleeding right nose. It is seen from Ex.P.16 that P.W.1 had not suffered any fracture. The injuries on the other hand are stated to be simple and the opinion is shown to be based on X-ray findings. Though P.W.1 had been cross examined at length on the manner in which he shown to have suffered injuries, yet we do not find any material worth mentioning in his evidence to disbelieve him that he had also received injuries in the course of the same transaction. Therefore, for the present, we conclude that P.W.1 was present at the crime scene where the crime was perpetrated on his grand daughter Muthulakshmi.

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11. P.W.1 is the grand father of the deceased and father of P.W.2. P.W.1 is aged about 75 years. His evidence shows that a few days prior to the occurrence day, his grand daughter, namely the deceased, was made fun of by A1 and A2, which she had brought to his notice and therefore he questioned A1 and A2. We do not find anything unusual in the conduct of P.W.1 in resorting to such action on his grand daughter bringing to his notice about the bullying by A1 and A2. His evidence shows that ten days

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after the occurrence, namely, the occurrence day, A3 and A4 under intoxication came in front of his house and started creating a scene and that resulted in a commotion opposite to his house. As the commotion was going on, A1 and A2 had appeared there and A1 was having a kerosene container in his hands. P.W.1 would state that A1 after pouring kerosene on his grand daughter, namely, Muthulakshmi set fire to her and A2 also threw a lighted match stick. He had struck to his evidence on the occurrence proper in his evidence in cross and therefore his evidence in chief as to how his grand daughter had come to sustain burn injuries at the hands of A1 and A2 remain intact. This evidence of P.W.1 is corroborated by the oral evidence of P.W.3, who is another resident of the same village. Apart from giving details of the earlier occurrence in which Muthulakshmi was bullied by A1 and A2, he would proceed to state that on the occurrence day, he was at the tea shop at about 7.30 p.m. and on coming to know there was a commotion in his brother's house, namely, P.W.1, he ran to the place where he found Muthulakshmi standing outside her house. He also saw the first accused pouring kerosene on Muthulakshmi and then A2 throwing a lighted match stick on Muthulakshmi, as a result of which, Muthulakshmi was engulfed in flames. Once again we will have to state that this witness though cross examined by the defence, did not give any favourable answers in favour of the accused. Therefore, without any hesitation, we hold that the evidence of P.W.s 1 and 3 individually as well as in corroboration to each other establish the involvement of A1 and A2 in perpetrating the crime on Muthulakshmi. The evidence of P.Ws. 1 and 3 also show as to how P.W.1 had sustained injuries. Therefore, the prosecution had definitely established by the direct/primary evidence of P.Ws. 1 and 3 as to how P.W.1 had came to sustain injuries and as to how Muthulakshmi was set on fire. In addition to the above, we have the evidence of P.Ws. 2 and 4, who are none else than the father and mother of Muthulakshmi. P.W.2's evidence as far as the occurrence proper is concerned shows that on his daughter catching fire, he ran to the scene and at that time, he saw A1 and A2, dropping the kerosene container and match box respectively, moving away from the scene and when he asked his daughter as to what had happened, his daughter told him that A1 poured kerosene on her and A2 set fire to her. P.W.4's evidence is also to the same effect, namely, as she ran towards her house, on hearing her daughter crying in pain, she saw A1, dropping the kerosene container and A2 dropping the match box, running. Therefore, the evidence of P.Ws.2 and 4, we have no hesitation to say, establish the presence of A1 and A2 at the crime scene and moving away from the crime scene immediately after the occurrence. Once again we will have to state that nothing worth mentioning had been elicited in their cross examination as to what they spoke in their evidence in chief could not be true.

12. We sum up our discussions stating that there is direct/primary evidence of P.Ws. 1 and 3 establishing the involvement of A1 and A2 in the crime perpetrated on Muthulakshmi and the direct evidence of P.W.1 that he came to sustain injuries at the hands of A3 and A4. The evidence of

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P.Ws.2 and 4 lend support to the oral evidence of P.W.s1 and 3 to the limited extent, namely, that immediately after the occurrence, A1 and A2 were seen running away from the scene of occurrence after dropping the kerosene container and the match box.

13. Let us now find out whether there are any other materials on record, which would connect the accused with the crime. We immediately say that there is a judicial dying declaration recorded by P.W.6 in the presence of P.W.9, the duty medical officer. A perusal of the evidence of P.W.s 6 and 9 show that Muthulakshmi was in a fit and conscious state of mind when P.W.6 chose to record her dying declaration. P.W.6 would state that on receipt of Ex.P.4, the intimation from the hospital to record the dying declaration of Muthulakshmi, she had reached the hospital at about 2.30 p.m. and after satisfying himself that Muthulakshmi was in a fit and conscious state of mind, proceeded to record the dying declaration. His evidence also shows that he secured the presence of P.W.9, the duty doctor to be by his side. At the beginning of Ex.P.6, the dying declaration, the Judicial Magistrate had certified that the patient is conscious and fit to give dying declaration; at the foot of Ex.P.6, P.W.9 had certified about the fit and conscious state of mind of Muthulakshmi and at the end of the dying declaration, the Judicial Magistrate had once again made an endorsement about the fit and conscious state of mind of Muthulakshmi. From the evidence of P.Ws.6 and 9, we do not find that when P.W.6 was recording the dying declaration, any of the relatives of Muthulakshmi were by her bed side, and there is no chance to influence her mind. Therefore we have no hesitation at all to conclude that there are no suspicious circumstances at all in recording of the judicial dying declaration. Though P.W.6 had deposed as to what Muthulakshmi told him during the dying declaration, yet we have decided to look into the dying declaration itself. Ex.P.6 is the dying declaration, in which, Muthulakshmi in a crisp manner had implicated A1 and A2 in the crime perpetrated on her. She had stated in Ex.P.6, as she was watching television, A1 brought kerosene and then poured it on her and A2 set fire to her by a lighted match stick and then both ran away. This dying declaration is consistent with the oral evidence of P.W.s 1 and 3 as referred to earlier. This dying declaration unerringly implicates A1 and A2 with the crime. Therefore, in the light of our discussion referred to above, we have no reason to disbelieve the judicial dying declaration and accordingly, we are accepting it as a true and voluntary disclosure made by Muthulakshmi to P.W.6, the Judicial Magistrate as to how she came to sustain burn injuries and at whose hands. This dying declaration, as already stated, establishes the involvement of A1 and A2 in the crime. Therefore, there cannot be any difficulty at all for us in holding that besides the evidence of P.W.s1 and 3 as direct/primary evidence, there is the evidence of P.W.s 2 and 4 as corroborative evidence to the evidence of P.W.s1 and 3 and Ex.P.6, the judicial dying declaration establishing the involvement of accused No.1 and No.2 in the crime. The further cross examination of P.W.13 done by the accused and Ex.D.1 do not in any way improve the case

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in favour of the accused. Even at this stage itself, we want to add that in the judicial dying declaration, Muthulakshmi had not implicated A3 and A4 at all. It is not in the evidence of either P.W.1 or P.W.3 that A3 and A4 also in any manner participated in the crime perpetrated on Muthulakshmi by A1 and A2. The oral evidence of P.Ws. 1 to 4 do not in any way implicate A3 and A4 in the crime committed on Muthulakshmi – since deceased. In these circumstances, holding that the prosecution had established the involvement of A1 and A2 alone in setting fire to Muthulakshmi, we hold that the prosecution had miserably failed to establish that A3 and A4 also are responsible for the crime perpetrated by A1 and A2 on Muthulakshmi. There is medical evidence showing that death is due to the effect of burns. The resultant position would be A3 and A4 has to be acquitted forthwith and accordingly they are acquitted.

14. A faint argument is advanced by the learned counsel for the appellants that the evidence on record shows that there was a quarrel in front of the house of P.W.1 before A1 and A2 committed the crime on Muthulakshmi. Therefore, we went though the entire materials in that context. What are all available from the evidence, as we could understand, is that A3 and A4 under intoxication went opposite to the house of P.W.1 and created a scene. There is no material at all to show that Muthulakshmi was any where near the scene where there was a quarrel. The evidence only shows that Muthulakshmi was standing and she was a girl aged about 19 years. Her dying declaration is that she was inside her house and watching television and the accused set fire to her as indicated earlier. Therefore, assuming there was a commotion at the crime scene, it has nothing to do with the act of A1 and A2 committing the crime on the innocent Muthulakshmi, who was just there watching television. Therefore we deny any relief to A1 and A2 based on Exception 4 to Section 300 of the Indian Penal Code.

15. Now let us address ourselves to the question of law argued by Mr.R.Sankarasubbu, learned counsel, who appeared to have done enormous home work to sustain his point. We must also place on record that Mr.N.R.Elango, learned Additional Public Prosecutor had also taken considerable efforts in meeting the legal points raised by the learned counsel for the appellants. Having regard to the legal point involved, we have also decided to have the assistance of a learned member of the bar and accordingly, we appointed Mr.Abudukumar Rajarathinam, a learned member of the Bar to assist this Court. We must also record that he also left no stones unturned in assisting this Court.

16. In C.M.P.No.1601 of 2006 a request is made to this Court that this Court should take additional evidence by referring appellants 1 and 2 for radiological examination for the purpose of fixing their age. This petition is supported by an affidavit sworn to by one Ayammal, the mother

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of the petitioners/appellants 1 and 2. It is a short affidavit. Nowhere she states in the affidavit the respective date of births of her sons, namely, A1 and A2. In the affidavit filed in support of this petition, she relies upon the judicial dying declaration. In the judicial dying declaration, Muthulakshmi - since deceased had given the age of A1 as 18 and the age of A2 as 15. This material is relied upon in support of C.M.P.No.1601 of 2006. In our considered opinion, Muthulakshmi is not a competent person to speak about the age of the assailants, in particular reference A1 and A2. She herself is shown to be aged 19 years. The only person competent to speak about the date of birth of A1 and A2 is their mother only. Their mother had sworn to the affidavit, as already stated, in which she has not chosen to give the date of births of her sons. A counter affidavit to the C.M.P. is filed and sworn to by the Inspector of Police. In that counter, in paragraph 3, it is stated that on the date of occurrence, appellant No.1 was aged 23 years and the second appellant was aged 20 years. A certificate from the Headmaster of Government Higher Secondary School, Sukkampatti, Salem - 636 122 is produced by the learned Additional Public Prosecutor, which shows that Sasi (A2) was born on 7.3.1983. The said certificate shall form part of the records. In our considered opinion, we see no reason at all from the materials noted above as to why we must probe further to fix the age of appellants 1 and 2. There is one thing certain, namely, A2/appellant No.2 was born on 7.3.1983. If the age of A1 has to be fixed by conducting an enquiry, then a duty is cast upon the person, who is trying to get the age so fixed, to place at least reasonable acceptable material before this Court so that this Court can exercise the power in favour of the person, who is making such a request. Even during trial or even during the time when the accused was questioned under Section 313 of the Code of Criminal Procedure, he had not taken any stand at all based on his age. In fact he had given his age in the 313 answer as 23. A2 had given his age as 19. The questioning was done on 17.12.2002. Under these circumstances, we are of the firm opinion that A1 (appellant No.1) has not made out any case at all for conducting any enquiry to fix his age. Accordingly, we reject the C.M.P.No.1601 of 2006 as far as the first petitioner, namely, appellant No.1 is concerned. However the said petition stands answered in favour of petitioner No.2/appellant No.2, since as per the certificate produced by the learned Additional Public Prosecutor, it is seen that the second appellant was born on 7.3.1983. The occurrence was on 10.2.2002. On that day, the second appellant had completed 18 years, 11 months and a few days. The trial was commenced on 11.2.2002. On that day, two enactments alone were in force, which can be taken into account. One is the Juvenile Justice (care and protection of Children) Act 2000 and the other is the Tamilnadu Borstal Schools Act 1925. Tamilnadu Children Act stood repealed by Juvenile Justice Act, 1986. To apply the provisions of the Juvenile Justice Act, which is admittedly in force on the date when the trial commenced, under Section 2(k) of the above referred to Act, "juvenile" or "child" is defined as a person, who has not completed 18 years of age. Since the second appellant is shown to have completed 18 years of age, we have no hesitation at all to hold that the second appellant is not

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entitled to the protection of Juvenile Justice Act (care and protection of Children) Act, 2000 This does not mean that the second appellant has no other enactment to fall upon. In fact, he could be governed by the Tamilnadu Borstal Schools Act 1925, provided he satisfied the requirements of that Act. The question is even if the Act applies to him, namely, as an adolescent offender, yet is he entitled to the benefit of the provisions of the said Act.

17. In the context of the argument advanced by the learned counsel for the appellants basing the claim of appellants 1 and 2 under the provisions of the Tamilnadu Borstal Schools Act 1925 itself, we now go into the relevant provisions of the said Act. Section 2(1) defines an adolescent offender as here under:

> "(1) "Adolescent Offender" means any person who has been convicted of any offence punishable with imprisonment or who having been ordered to give security under Section 118 of the Code of Criminal Procedure has failed to do so and who at the time of such conviction or failure to give security is not less than 16 in the case of a boy and not less than 18 in the case of a girl, but not more than 21 years of age in either case."

The trial Court pronounced the judgment in this case on 20.2.2003. Going by the date of birth, namely, 7.3.1983, even on the date of which the judgment was pronounced by the trial Court, there cannot be any difficulty that he was under 21 years of age. Therefore, without any hesitation, we conclude that appellant No.2 is an adolescent offender. It must be noticed that to attract the provisions of the Tamilnadu Borstal Schools Act, the crucial date to be taken into account is the date of conviction and not the date on which the crime was committed. We have already noted, even on the date of conviction, appellant No.2 was less than 21 years of age and therefore he is definitely an adolescent offender. At this stage, we note that besides being within the age limit, namely, not less than 16 years and not more than 21 years in the case of a boy to come within the definition of an adolescent offender, the said adolescent offender should have been convicted of any offence punishable with imprisonment. We elaborate on the last noted point later on. Section 8(1) of the Tamilnadu Borstal Schools Act 1925 reads as here under:

> "8. Power of Court to pass sentence of detention in Borstal School - (1) When it appears to a Court having jurisdiction under this Act that an adolescent offender should by reason of his criminal habits or tendencies or association with persons of bad character, be subjected to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime, it shall be lawful for the Court, in lieu of passing a sentence of imprisonment, to pass a sentence of detention in a

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Borstal School for a term which shall not be less than two years and shall not exceed five years, but in no case extending beyond the date on which the adolescent offender will, in the opinion of the Court, attain the age of twenty three years."

We are not extracting Sub-section 2 and 3 of the said section 8 for the present. Section 10-A of the Tamilnadu Borstal Schools Act reads as here under:

"10-A. Power of State Government to transfer offenders sentenced to transportation of Borstal Schools - The State Government may, if satisfied that any offender who has been sentenced to transportation either before or after the passing of the Madras Borstal Schools (Amendment) Act, 1939, and who at the time of conviction was not less than 16 in the case of a boy and not less than 18 in the case of a girl, but not more than 21 years of age in either case might with advantage to be detained in a Borstal School, direct that such offender shall be transferred to a Borstal School, there to serve the whole or any part of the unexpired residue of the sentence. The provisions of this Act shall apply to such offender as if he had been originally sentenced to detention in a Borstal School.

An order may be made under this section notwithstanding that the sentence of transportation has been subsequently commuted into a sentence of imprisonment."

Therefore for the Act to apply the person convicted, if he is a boy, should not be less than 16 years and not more than 21 years of age on the date of his conviction and he should have been convicted of any offence punishable with "imprisonment." If he comes within the definition of an adolescent offender, then under Section 8, the Court is given the power in lieu of passing a sentence of imprisonment, to pass a sentence of detention in a Borstal School. What is the period of detention is also mentioned in the said section.

18. Having regard to the expression used in Section 2(1), namely, any offence punishable with "imprisonment"; " and in lieu of passing a "sentence of imprisonment" under Section 8, the question that comes up for consideration is whether the term imprisonment mentioned in the above two sections would include "imprisonment for life" or "imprisonment simpliciter". Mr.R.Sankarasubbu, learned counsel appearing for the appellants by relying upon the judgment of the Supreme Court reported in 1985 SCC (Crl.) 280 (Bhagirathi Vs. Delhi Administration) would contend that the term "imprisonment" found under Section 2(1) and Section 8 of the Tamilnadu Borstal Schools Act would include sentence of "imprisonment for life" and therefore, in this case though appellant No.2 stands sentenced to undergo imprisonment for life, having regard to the law laid down in the above referred to judgment, this Court would be in a position to

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exercise the power available under Section 8 of the Tamilnadu Borstal Schools Act in favour of Appellant No.2. The judgment of the Supreme Court is by a Constitution Bench. We carefully went through the above referred to judgment. A question arose before the Supreme Court in that judgment as to whether "set off" provided under Section 428 of the Code of Criminal Procedure is available only to a person, who has been sentenced to "imprisonment for a term" or would it include a person, who had been sentenced to "imprisonment for life". In other words the question that was called upon to be decided by the Supreme Court was whether the expression "imprisonment for a term" found in section 428 of the Code of Criminal Procedure would include "imprisonment for life" as well. In the case before the Supreme Court, the facts are as here under:-

"In one of the cases, a convict prisoner moved the Delhi High Court to refer his case to the Delhi Administration for an appropriate relief as he, as a person sentenced to life imprisonment had been in jail for fourteen years together with the remissions earned by him and therefore his release must be considered. The Delhi High Court rejected his petition on the ground that Section 428 of the Code of Criminal Procedure on the face of it apply only to a case where there is imprisonment for a term and that sentence of life imprisonment is not imprisonment for a term. In the connected case, another convict prisoner would contend that in computing the period of fourteen years of imprisonment he must be given the benefit of remissions earned by him must be given credit. On the above factual scenario, the Supreme Court analysed the entire arguments and ultimately it was held that "imprisonment for a term" mentioned in Section 428 of the Code of Criminal Procedure would include "imprisonment for life" and therefore set off is permissible. The Hon'ble Supreme Court of India in the judgment referred to supra, as already stated, was considering the ambit of section 428 of the Code of Criminal Procedure. The expression "imprisonment for a term" was found to include in itself "imprisonment for life" as well. The court went on to hold that a reading of section 428 of the Code of Criminal Procedure does not convey any restrictive meaning to be given to the expression "imprisonment for a term" found mentioned in that section. As noted earlier, the issue raised before the Supreme Court was whether persons serving imprisonment for life would be entitled to have to their credit the remissions earned by them in having the benefit of set off provided under section 428 of the Code?

19. In support of his submission, that once it is found that A2 is an adolescent offender, the court trying him cannot sentence him to any imprisonment including life imprisonment but only send him to a Borstal School and for that proposition though the Government under Section 10-A of the Tamil Nadu Borstal Schools Act may have the power, yet, it having lost it due to the appellant crossing the upper age limit of 23 years as on date, this court can still exercise that power taking the role of the Government, learned counsel relied upon the following judgments, namely,

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1. 1981 SCC (Cri.) 809 (Jayendra and another V. State of Uttar Pradesh)
2. 1984 SCC (Cri.) 635 (State of Andhra Pradesh V. Vallabhapuram Ravi)

3. 1989 SCC (Cri.) 486 (Bhoop Ram V. Stateof U.P.)

4. 1993 (Vol.37) Madras Law Journal Report (Cri.) 257 (Rajan alias Thiruvengada Karthigeyan V. State)
5. 1997 (1) Law Weekly (Cri.) 15 (Karupayee etc. V. State, etc.

6. 2000(1) Law Weekly (Cri.) 142 (Ramasamy V. State)

Let us now go through each one of the judgments carefully to find out whether it helps to advance the cause of the second appellant. In Jayendra's case, referred to supra, Uttar Pradesh Children Act was under consideration before the Supreme Court. Appellant No.1 was claiming the benefit of the above referred to Act. The Supreme Court noticed from the Radiologist's examination and report on appellant No.1 that he was 23 years of age on the date of that report which means on the date of evidence he would have been 16 years and four months old. The crime was committed on 17.6.1974. Appellant No.1 had given his age as 15 years. Having the above facts in mind, the Supreme Court analysed the provisions of the Uttar Pradesh Children Act. Section 2(4) of the Act defines a "child" to mean a person under the age of 16 years. Having regard to the various circumstances, the Supreme Court had concluded that Appellant No.1 was a child within the meaning of the provisions of that Act on the date of the occurrence. That judgment noted that under Section 27 of the Uttar Pradesh Children Act that notwithstanding anything to the contrary in any law, no court shall sentence a child to "imprisonment for life" or to any "term of imprisonment". Therefore it is clear that there was a total bar under the Uttar Pradesh Children Act to sentence a child to any term of imprisonment. Under Section 29 of the Act, as could be seen, from the judgment of the Supreme Court itself, whenever a child is found to have committed an offence punishable with imprisonment, the Court may order him to be sent to an approved school for such period of stay as will not exceed the attainment by the child of the age of 18 years. Therefore, it must be remembered that there was a total bar on the part of any Court exercising power in the State of Uttar Pradesh from sending any child, on being found guilty of an offence to any form of imprisonment and in such a situation, he shall be sent only to an approved school where his stay would not be beyond the age of 18. On those facts, the Supreme Court proceeded to state that though in the normal course they could direct appellant No.1 to be sent to an approved school, yet they could not do it, since appellant No.1 was aged 23 years as on the date. In our respectful opinion that judgment must be understood in the face of the provisions of law which the Honourable Judges of the Supreme Court were dealing. We

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have already noted the relevant sections in that Act, which imposed a total bar on a Court from sentencing a child, if found guilty, to any form of imprisonment. That is not the position as far as the Tamilnadu Borstal Schools Act is concerned, which we will elaborate later.

20. In Vallabhapuram Ravi's case, referred to supra, a similar provision like Tamilnadu Borstal Schools Act, namely, AndhraPradesh Borstal Schools Act was under consideration. It is not in dispute that the provisions of Andhra Act are in pari-materia with the Tamilnadu Act. The facts available in that case are the convict prisoner, on being found guilty of the offence of murder was sentenced to undergo imprisonment for life. The Supreme Court had dealt with in that judgment in great detail as to how Law to protect children, on being found guilty of offence, was evolved. The State Government in that case exercising power under Section 10-A of that Act (in parimateria to the Tamilnadu Act) directed the detention of the convict prisoner in a school. Though he has crossed the upper age limit prescribed under the Act, he was not released from the school and therefore he moved the High Court of Andhra Pradesh for an appropriate relief and a writ was issued directing his release. The State of Andhra Pradesh went up in appeal to the Supreme Court. The point which weighed with the State Government in not releasing the convict prisoner from the school, though he has crossed the upper age limit, was the impact of Section 433-A of the Code of Criminal Procedure. Considering the scope and impact of Section 433-A of the Code of Criminal Procedure on the benevolent provision of the Andhra Pradesh Borstal Schools Act 1925, the Supreme Court held that despite the introduction of Section 433-A of the Code of Criminal Procedure, yet the right, which an adolescent offender gets under the Andhra Pradesh Borstal Schools Act, would not be taken away and therefore it sustained the order of the Andhra Pradesh High Court in directing the release of the adolescent offender. It must be noticed here that in the above referred to case decided by the Supreme Court, there was an order in favour of the adolescent offender passed by the State Government exercising their power under Section 10-A of the Andhra Pradesh Borstal Schools Act. Of course, this judgment overrules the judgment of this Court reported in 1982 Law Weekly (Cri.) 217 (Ganapathy, In re). In the context of the above, we immediately went through the judgment of this Court in Ganapathi's case to find out on what point of law, this Court's judgment was reversed by the Supreme Court. This Court in the above referred to judgment held that an adolescent offender sent to a Borstal School under the Tamilnadu Borstal Schools Act, after the expiry of his detention in the Borstal School, must serve the residue of imprisonment in the prison. This conclusion was based on Section 433-A of the Code of Criminal Procedure. Only to that extent, the Supreme Court in Vallabhapuram Ravi's case overruled the judgment of this Court. We will refer in great detail at a later stage in this judgment what is the Law laid down by this Court in Ganapathi's case and it's effect on the issue pending before us. In Bhoop Ram's case referred to supra, once again we find that Uttar Pradesh Children Act was under consideration. We had already noted the provisions of Uttar Pradesh Children Act in one of the

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earlier cases of the Supreme Court referred to above. In Bhoop Ram's case also it was found that the convict prisoner was a child and therefore he ought not to have been sentenced to imprisonment but ought to have been sent only to an approved school. The Court proceeded to hold that since the convict prisoner had crossed the upper age limit/the maximum period of detention in the approved school, it had no other go except to quash the sentence and release the convict prisoner forthwith. Jayendra's case was noted in this judgment. On facts we will have to state that the provisions of the Tamilnadu Borstal Schools Act are totally different from the provisions of the Uttar Pradesh Children Act.

21. In Rajan @ Thiruvengada Karthigeyan's case, the Tamilnadu Children Act and Juvenile Justice Act 1986 was under consideration. This Court found on the facts of that case, the Tamilnadu Children Act alone would apply and not the Juvenile Justice Act 1986. In that case also, on being found guilty of the offence of murder, the appellant was sentenced to undergo imprisonment for life. The conviction was confirmed. However, this Court found, on an argument advanced by the learned senior counsel in that case, based on the provisions of the Tamilnadu Children Act that the appellant in that appeal was 16 years and 9 months old on the date of occurrence, namely 1.11.1984 and his conviction was on 14.3.1986, on which date, he had completed 18 years one month and 13 days. The learned Judges referred to Sections 3(2) and 3(3) of the Act, where "Young person" and "Youthful offender" were defined to mean a person, who is 14 years of age or upwards and under the age of 18 years and a person, who has been convicted of an offence punishable with imprisonment and who at the time of such conviction was under the age of 18 years respectively. The Court then referred to Section 22 of the Act, which states "notwithstanding anything to the contrary contained in any law no child or young person shall be sentenced to death, or imprisonment or committed to prison in default of payment of fine etc." Even in this context itself we would like to draw a difference between this Act and the UttarPradesh Children Act. Under Section 27 of the UttarPradesh Children Act, the Court's power to sentence any form of imprisonment on a child is totally taken away. But in the Tamilnadu Children Act, there is no absolute bar in sending persons covered under the Act to imprisonment, since the proviso to Section 22 provides for sending young person to imprisonment. Section 23 (1) of the Act says that sending a person covered under that sub-section to a senior approved school is in addition to or in lieu of sentencing him according to Law to other punishment. In this context, we refer Section 8 of the Tamilnadu Borstal Schools Act under which, after deep consideration we say, there is no automatic and vested right in an adolescent offender to be sent to a Borstal School for detention. A reading of Section 8(1) and the entirety of Sub-Section 2 shows that before a person can be given a sentence of detention in a Borstal School in lieu of passing a sentence of imprisonment, the Court must be satisfied that it must appear for the Court it is most conducive for the reformation of the person found guilty and the repression of crime. In arriving at such a satisfaction, the Court has to call for a report from the Probation Officer and consider

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such report in addition to any other report or representation, which it may receive. Sub-clause (c) to Sub-Section (2) to Section 8 of the Act contemplates a further enquiry, as the Court thinks fit, be made. Then after completing all such exercise, the Court decides the suitability of the case for treatment in a Borstal School and it shall also be satisfied with the character, state of health and mental condition of the offender and the other circumstances of the case, from which the Court must hold that the offender is likely to be profited by such a treatment and discipline as aforesaid. In other words in one word we can say that under Section 8 of the Tamilnadu Borstal Schools Act, no adolescent offender found guilty of an offence, gets an absolute right to get transferred to a Borstal School for detention in lieu of a sentence of imprisonment. Why we are referring to Section 8 even at this stage is the judgment rendered by this Court in Rajan's case, which is under the Tamilnadu Children Act, has to be read in the context of the provision available in that Act. This Court in Rajan's case was fully conscious of the proviso to Section 22 of the Tamilnadu Children Act. However, going by the letter and spirit of Section 22 of the Tamilnadu Children Act and without going into the proviso to the section, this Court on the facts found in that case, held that the person found guilty in that case ought to have been dealt with under Section 23 (1) of the above referred to Act and the period of detention is to be as per Section 24 of the said Act. It cannot be out of context to mention here that the Tamilnadu Children Act was repealed by Juvenile Justice Act 1986. Then finding that the convict prisoner in that case ought to have been dealt with only under the provisions of the Tamilnadu Children Act, (the court did not express any opinion on the proviso to Section 22 of the Act probably for want of materials), this Court proceeded to quash the sentence following the judgment of the Supreme Court in Jayendra's case. Under Section 24 of the Tamilnadu Children Act, the period of detention would not exceed the age of 21. Since in that case, the youthful offender was already beyond the age of 21 on the date of judgment, this Court, while confirming the conviction, quashed the sentence.

22. In Karupayee's case there were two suo motu revisions. In both the cases, juveniles were convicted and sentenced the first one to life and the other rigorous imprisonment for five years. However, in view of imprisonment, they were directed to be detained in an approved school up to the age of 20 in the case of the girl and upto the age of 18 in the case of the boy with a direction that after the expiry of their detention in the School, they must be brought back to the prison. The Suo Muto revisions were at the instance of the Director of Social Defence. Juvenile Justice Act 1986 was in consideration. In that judgment, reliance was placed on the judgment of the Supreme Court in Vallabhapuram Ravi's case and by this Court in Rajan's case. Finding that the convict prisoners cannot be allowed to be brought back before the regular prison after the expiry of their period of detention in the School (Vallabhapuram Ravi's case), this Court quashed the sentence. Once again we will have to state that Karupayee's case, on facts, do not get attracted to the case on

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hand. In Ramasamy's case, the Tamilnadu Borstal Schools Act itself was under consideration. It was a judgment by a Division Bench of this Court. Ramasamy was a prisoner was tried for the offence of murder. On being found guilty, he was sentenced to life imprisonment. His conviction was confirmed. An argument was advanced that he being an adolescent offender, he ought not to have been sentenced to imprisonment. This Court accepted that on the date of the crime as also on the date of conviction, the convict prisoner was below 21 years of age. The argument advanced before this Court on behalf of the convict prisoner on the above issue is found in paragraph 15 of the judgment and for clarity sake we extract paragraph 15 here under:-

> "15. Learned counsel appearing for the appellant/accused contends that the learned Sessions Judge was justified in sentencing the accused to imprisonment for life since admittedly, the accused was an adolescent offender as at the time of incident and also on the date of conviction he was below 21 years of age. According to him, under Section 10-A of the Tamilnadu Nadu Borstal Schools Act, if an adolescent offender is convicted for capital punishment, he can be detained in a borstal school and he cannot be sentenced to imprisonment for life. We find every force in the contention."

In answering this issue, this Court referred to Vallabhapuram Ravi's case, Elumalai's case, Bhoop Ram's case and Karupayee's case (in paragraph 16 to 19). Then this Court in paragraph 20 held as here under:

> "In view of the above, we are of the view that though the conviction of the appellant is sustained, his sentence is quashed as was ordered by the Supreme Court. In the result, the appeal is disposed of in the above terms."

In the earlier portion of this judgment we have already found what are the facts in Vallabhapuram Ravi's case, Bhoop Ram's case and Karupayee's case. In the first case, there was an order under Section 10-A of the Andrapradesh Borstal Schools Act. In Elumalai's case, the Supreme Court was considering the case of an adolescent offender, who had an order in his favour under section 10-A of the Tamil Nadu Borstal Schools Act. The question that came up before the Supreme Court in that case was, after the expiry of the period of detention in the Borstal school, should the adolescent offender be brought back to the prison to serve the reminder of the imprisonment. In disposing of that appeal, the court directed the State of Tamil Nadu to release all inmates of the Borstal schools in Tamil Nadu who have attained 23 years of age - forthwith. It also held that the appellant before the Supreme Court, if he satisfies the upper age limit prescribed under the Act, shall also be released forthwith. In the third case, Uttar Pradesh Children Act was under consideration. In Karupayee's case, Juvenile Justice Act 1986 was under consideration.

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Under Section 22 of the Juvenile Justice Act 1986 with which this Court was concerned in Karupayee's case, there is a total bar on the power of the Court to sentence any juvenile found guilty of an offence to imprisonment. Section 21 indicates the orders that can be passed by a Juvenile Court regarding delinquent juveniles and it excludes sentence of imprisonment. Such is not the provision in the Tamilnadu Borstal Schools Act. In any event, we find that this Court in Ramasamy's case did not take up the issue, namely, whether under the provisions of the Tamilnadu Borstal Schools Act a person sentenced to imprisonment for life can be brought under the purview of Section 8 of the said Act or not. Unless a specific issue is raised and answered, any judgment, assuming it touches upon the issue peripherally, cannot be said, we say with great respect, to have laid down any law on the subject. From a reading of paragraph 20 of the judgment in Ramasamy's case, we find that the learned Judges constituting a Division Bench of this Court have simply followed four cases referred to in paragraph 16 to 19 and held that whenever the outer period of detention in a school is exceeded, the sentence of imprisonment must be quashed, while in fact the four judgments relied upon by the Division Bench are in different context; different facts and on different provisions of law. As already stated, with greatest respect to the learned judges, we state in all humility that in Ramasamy's case, this Court has not laid down any law that any adolescent offender, who is sentenced to imprisonment for life would, as a matter of right, be entitled to the benefit of Section 8 of the Tamilnadu Borstal Schools Act.

23. Let us now go through the case law submitted before us by the learned Additional Public Prosecutor. Just to refresh our memory at this stage, the argument of the learned Public Prosecutor is that the provisions of the Tamilnadu Borstal Schools Act 1925 would not apply to a person, who is found guilty and sentenced to imprisonment for life. We may not hesitate also to say that in none of the judgments brought to our notice by the learned counsel for the appellants this point was raised; argued and then decided. In Vallabhapuram Ravi's case, which arose under the Andhra Pradesh Borstal Schools Act, this issue was not raised and answered. What was in issue in that case was whether despite an order passed by the Government under Section 10-A of the Andhra Act and after the expiry of the period of detention prescribed under that Act can a convict prisoner be brought before the regular prison or not to serve the reminder of the sentence and the Supreme Court answered in favour of the convict prisoner. In Jayendra's case and Bhoop Ram's case, Uttarpradesh Children Act alone were under consideration, where under Section 27 of the said Act, there was a total bar on the part of any Court in the State of Uttar Pradesh to send any person to any type of imprisonment on he being found guilty. In Elumalai's case, there was an order under Section 10-A of the Tamilnadu Borstal Schools Act, while in Karupayee's case, there was no such order under Section 10-A of the Act. We have already made ourselves clear in the earlier portion of the judgment, while dealing with Ramasamy's case, the Division Bench, which dealt with that case, after taking note of Vallabhapuram Ravi's case; Elumalai's case; Bhoop Ram's

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case; and Karupayee's case, had come to a conclusion that the sentence of imprisonment imposed on that appellant must be quashed. Learned Additional Public Prosecutor brought to our notice a direct judgment of this Court on the point reported in 1982 Law Weekly (Cri.) 217 (Ganapathy In re). No doubt in one of the judgments of the Supreme Court referred to earlier, this judgment is indicated to be overruled. On going through the judgment of the Supreme Court, we have already found that overruling of this judgment is only to the limited extent, namely, Law laid down that after the expiry of the detention in the Borstal School, the convict prisoner must go back to the regular prison to serve the rest of his imprisonment. Therefore, at the risk of repetition, we state that the judgment of this Court in Ganapathi's case so far as it relates to the impact of Section 8 of the Tamilnadu Borstal Schools Act, on a person, who is found guilty and sentenced to imprisonment for life stands good even as on date. To say in other words, Law laid down by this Court in the above referred to judgment is that a person convicted and sentenced to undergo imprisonment for life would not be covered by Section 8 of the Tamilnadu Borstal Schools Act.

24. The question raised in Ganapathi's case before a Division Bench of this Court is as here under:

> "18. A pertinent question arises in this context, whether an accused, who stands convicted of an offence punishable under S.302, I.P.C. can be deemed to be an adolescent offender within the meaning of S.2(1) of the Act, so that S.8 of the Act can be invoked in his case ans his detention in a Borstal School ordered....."

The accused in that case was shown to be 18 years of age on 23.1.1980 when he was questioned under Section 313 of the Code of Criminal Procedure. The Court also found that on the date of conviction, the accused was not less than 18 years of age and not more than 21 years of age. Then the Court referred to Section 2(1) and Section 8(1) of the Tamilnadu Borstal Schools Act and laid down the law that the term "imprisonment" occurring in the above referred to two sections would not include within its ambit the sentence of "imprisonment for life". Learned Additional Public Prosecutor even before bringing to our notice this judgment, by referring us to Section 53 of the Indian Penal Code would contend that "imprisonment for life" would not come within the term "imprisonment" occurring in the above referred to two sections. We find that even the Division Bench of this Court having regard to the expression "Imprisonment" found in the above referred to two sections and Section 53 of the Indian Penal Code categorically laid down as here under:

> "Therefore, a Court having jurisdiction under this Act can order borstal detention of an adolescent offender under S.8 of the act only in cases where the offender would have been, in the opinion of the Court, otherwise liable for imprisonment

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simpliciter falling within Cl.(3) of S.53, I.P.C. In other words, if the offender is, in the opinion of the court, liable to be sentenced to imprisonment for life for the offence committed by him, then the Court cannot apply S.8 of the Act and order his borstal detention. In such cases, the power is given only to the State Government under S.10-A of the Act."

Therefore it is clear that this Court has laid down the law on the issue raised before us by Mr.R.Sankarasubbu, learned counsel for the appellants against appellant No.2. Mr.R.Sankarasubbu, learned counsel, as already stated, made strenuous efforts to convince us that the expression "imprisonment" occurring in Sections 2(1) and 8(1) of the Tamilnadu Borstal Schools Act would include within itself "life imprisonment". For this, he heavily relied upon the judgment of the Supreme Court reported in 1985 SCC (Cri.) 280 (Bhagirathi's case) referred to supra. In that case, the Honourable Judges of the Supreme Court were interpreting the expression "imprisonment for a term" found in Section 428 of the Code of Criminal Procedure. The argument was that the said expression "imprisonment" would include "Imprisonment for life". The Honourable Supreme Court noted in paragraph 9 of the said judgment the arguments and the counter arguments advanced before them on the basis of the provisions contained in Section 53, 53-A (4) (a) and (b), 57,65 and 511 of the Indian Penal Code. On going through the judgment, we find, that the Honourable Judges in that case held that the above referred to sections do not militate against the view which have taken. We also hold with greatest respect, that since on the point in issue raised on the very same provision of law with which we are concerned, a Division Bench of this Court had answered that issue against the accused, we are inclined to follow the said judgment of this Court rendered in Ganapathi's case. As already noted, only a portion in the judgment of this Court in Ganapathi's case, which declared that after the expiry of the detention in the Borstal School, the life convict prisoner must go back to the regular prison to serve the rest of the imprisonment alone, was reversed by the Supreme Court in one of the cases referred to earlier. In this case, all the appellants have been convicted and sentenced to undergo imprisonment for life. Though appellant No.2 is an adolescent offender, having regard to the punishment to which he had been sentenced, namely, life imprisonment, we have no hesitation in the face of the judgment of this Court in Ganapathi's case referred to supra, the argument advanced by Mr.R.Sankara Subbu, learned counsel for the appellants, that this Court should extend the benefit of Section 8 of the Tamilnadu Borstal Schools Act to the second appellant; since appellant No.2 had already crossed the upper age limit of 23 prescribed under the above referred to Act for his detention in the Borstal School, his sentence must be quashed, has to be rejected. In all the cases, namely, Vallabhapuram Ravi's case and Elumalai's case, there was an order under Section 10-A of the respective State Borstal Schools Act. In Bhoop Ram's case and and Jayendra's case, Uttar Pradesh Children Act alone was under consideration. Only in Ramasamy's case, a Division Bench of this Court quashed the sentence following the above

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referred to judgments. Since we find that there is a direct judgment of this Court (a judgment of a Division Bench) on the issue and since there is no other direct judgment on the point in issue, following the judgment of this Court in Ganapathi's case, we reject the argument advanced by the learned counsel for the appellants. Mr.Sankara Subbu, learned counsel for the appellants made a submission that under Section 10-A of the Tamilnadu Borstal Schools Act the Government has the power, in fact this Court in Ganapathi's case said that in all cases where life imprisonment is the sentence given, then only the State Government has the power under Section 10-A of the Tamilnadu Borstal Schools Act. Therefore we do not want to enter the domain of the Government under Section 10-A of the Act.

25. In AIR 1949 Madras 109 (In re Krishnaswami alias Kittan), the appellant was found guilty of the offence of murder and sentenced to transportation for life, which is equivalent to imprisonment for life. It was conceded before the Bench that Section 8 of the Tamilnadu Borstal Schools Act would not apply and the only power available is under Section 10-A of the said Act. That is a concession given before the Division Bench. We find that the Division Bench recommended the case of the convict prisoner to the Government's consideration under Section 10-A of the Tamilnadu Borstal Schools Act. In AIR 1955 Andhra 118 (In re T.Munirathnam Reddi), after confirming the conviction and sentence of life imprisonment and on the facts noted therein, the Andhra Pradesh High Court referred the prisoner's case to the Government for consideration under Section 10-A of the Andhra Pradesh Borstal Schools Act. In those two cases, when recommendations were made to the Government, the Court had enough materials on record. For the Government to exercise the power under Section 10-A of the Tamilnadu Borstal Schools Act, the requirements mentioned therein must be satisfied. Therefore, what would weigh the Government in testing whether it would be advantageous to detain the detenu in the Borstal School or not is a matter which lies purely within their domain. Under these circumstances, we are not inclined to give a positive recommendation to the Government to consider the case of the second appellant under Section 10-A of the Tamilnadu Borstal Schools Act. But however, we say, if the second appellant makes any request to the Government to consider his case under Section 10-A of the Tamilnadu Borstal Schools Act, it is for them to decide the issue in a manner known to law without in any way being influenced by anything said by us in this judgment.

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26. If any request is made by the second appellant to the Government to exercise their power under Section 10-A of the Tamilnadu Borstal Schools Act, then the Government is directed to consider the said request as indicated earlier and take a decision there on, in any event, not more than three months from the date of receipt of such a request.

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27. Consequently, the appeal stands disposed of as here under:

The judgment under challenge so far as appellants 1 and 2 are concerned convicting them for offences under Sections 294(b) I.P.C. and 302 read with 34 I.P.C. is confirmed. The judgment of conviction convicting A3 and A4 for the offence under Section 302 read with 34 I.P.C. is set aside and they are accordingly acquitted. Fine amount, if any, paid by them for the said offence shall be refunded forthwith. The judgment of conviction convicting A3 and A4 for the offence under Section 324 I.P.C. stands confirmed. If A3 and A4 had suffered the sentence of imprisonment imposed on them for the conviction under Section 324 I.P.C., then they are directed to be set at liberty forthwith unless their detention is required in any other case.

sl

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Additional District and Sessions Judge, Fast Track Court-II, Salem.

2. -Do-Through The Principal Sessions Judge, Salem.

3. The District Collector, Salem District, Salem.

4. The Director General of Police, Mylapore, Chennai-4.

5. The Superintendent of Central Prison, Coimbatore.
(with 3 copies for communication to the accused)

6. The public Prosecutor, High Court, Madras.

7. The Inspector of Police,
Veeranam Police Station, Salem District.

1 cc To Mr.R.Sankarasubbu, Advocate, SR.31768.

Crl.A.No.1308 of 2003
& C.M.P.No.1601/2006

HPR(CO)
RVL 08.08.2006

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